BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KELLY L. CROOK	)	
Claimant	)	
V.	)	
	)	
TITAN TRAILER MFG., INC.	)	
Respondent	)	Docket No. 1,074,141
AND	)	
	)	
ACCIDENT FUND NATIONAL INS. CO. & MIDWEST BUILDERS CASUALTY MUTUAL COMPANY[1]	)	
Insurance Carriers	)	

ORDER

Respondent and insurance carrier, Accident Fund National Insurance Company, (respondent), through Bill W. Richerson, of Overland Park, requests review of Administrative Law Judge Rebecca Sanders' August 26, 2015 preliminary hearing Order. Bruce A. Brumley, of Topeka, appears for claimant. There are no other appearances.

The record on appeal is the same as that considered by the judge and consists of the August 25, 2015 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUE

Claimant alleged injury by repetitive trauma with an injury date of March 29, 2014. The judge ordered medical treatment with Talal Khan, M.D. Respondent requests the Order be reversed. Respondent, in its application for review, denied claimant sustained personal injury by accident arising out of and in the course of her employment, including that her work duties were the prevailing factor in her asserted need for treatment. Respondent's brief asserts the greater weight of the medical evidence does not support the judge's order for medical treatment, respondent's medical evidence is superior to claimant's medical evidence, claimant's medical expert's opinions are wrong and claimant failed to prove she needs ongoing medical treatment.

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[1] The record reflects Eric K. Kuhn, of Wichita, entered an appearance for respondent and insurance carrier, Midwest Builders Casualty Mutual Company. A notation in the judge's file reflects claimant will be dismissing Midwest Builders Casualty Mutual Company as a party to this action.

Claimant maintains the Order be affirmed. Claimant argues respondent is not contesting compensability, but is rather questioning the judge's order for medical treatment, which is not an appealable issue.

The issue is: does the Board have jurisdiction to consider respondent's appeal?

FINDINGS OF FACT

In her work, claimant used a "grinder" to remove rust from steel. She performed such work for years. She developed right arm symptoms and had authorized surgery, including a carpal tunnel release, cyst removal and treatment of right third digit trigger finger. After surgery, she was treated by John Massey, M.D., a pain management specialist. Dr. Massey treated claimant from July 28, 2014, through April 6, 2015.

Daniel D. Zimmerman, M.D., was retained by claimant and he diagnosed her with complex regional pain syndrome and suggested various treatments. Dr. Massey did not agree with Dr. Zimmerman's diagnosis or recommendations. Dr. Massey stated additional treatment suggested by Dr. Zimmerman would not help claimant become more functional.

The judge's order noted claimant had symptoms that should be evaluated, regardless of whether complex regional pain syndrome is her correct diagnosis.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[2] The burden of proof is on the claimant to establish an award of compensation. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[3]

K.S.A. 2013 Supp. 44-508 provides, in pertinent part:

> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
>
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

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[2] K.S.A. 2013 Supp. 44-501b(b).

[3] K.S.A. 2013 Supp. 44-501b(c).

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The Board's review of preliminary hearing orders is limited to allegations that a judge exceeded his or her jurisdiction,[4] including review of jurisdictional issues listed in K.S.A. 2013 Supp. 44-534a(a)(2): (1) did the worker sustain injury by accident or repetitive trauma; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.[5]

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[4] K.S.A. 2013 Supp. 44-551(l)(2)(A).

[5] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

ANALYSIS

The judge's order for medical treatment is not appealable from a preliminary hearing. Whether the judge erred in ordering medical treatment is not an argument the Board has jurisdiction to consider.

Respondent's brief does not address issues that might be properly before the Board under K.S.A. 2013 Supp. 44-534a. There is no real argument that claimant's injury by repetitive trauma did not arise out of and in the course of her employment. In fact, respondent seems to concede claimant's injury is compensable and it provided her appropriate treatment on a voluntary basis. Respondent notes, in passing, that "the medical evidence . . . does not support a finding that the Claimant's work activities are the prevailing factor in any ongoing need for additional medical treatment, or that the Claimant will benefit from any additional treatment . . . ."[6] However, respondent's argument focuses on the judge being wrong because respondent believes it put forth the better medical evidence regarding what treatment claimant needs, why Dr. Zimmerman's diagnosis is wrong and the treatment he recommends will be detrimental for claimant. Respondent's appeal actually concerns whether the judge's award of medical treatment was proper, which is not an appealable issue from a preliminary hearing ruling. For a Board Member to second-guess whether a judge is correct in ordering medical treatment for what is otherwise a seemingly compensable case would expand what the Board is statutorily permitted to review under K.S.A. 2013 Supp. 44-534a.

This Board Member dismisses the appeal for lack of jurisdiction.[7]

CONCLUSION

WHEREFORE, the undersigned Board Member dismisses respondent's appeal of the August 26, 2015 preliminary hearing Order.[8]

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

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[6] Respondent's Brief at 3.

[7] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[8] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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